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IN THE

Supreme Court of the United States

October Term, 1967
No. 147

K-91, INC.,
Petitioner,

v.

GERSHWIN PUBLISHING CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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Concerned about the questions raised in the petition, the court on October 9, 1967 requested the government to express its views. Complying with the court's request, the Solicitor General on December 12, 1967, filed a memorandum as *amicus curiae* and the clerk of the court accorded the parties an opportunity to comment. These are the petitioner's comments.

DISCUSSION

1. The Government's Failure to Respond to the Court's Request

In seeking the government's views the court did not want only an opinion of whether or not the result below

was correct. The court sought the government's views on whether the questions presented by the petition merit the court's attention and whether the reasons given in the petition justify granting the writ. Without conceding that the lower decision is correct, the petitioner submits that the court often hears cases in order to answer important and perplexing questions of national concern and to resolve inconsistencies among the lower courts. The government ignored these considerations and failed to address itself to the questions raised in the petition.

The petitioner will not re-argue the reasons the court should hear this case but stands on its petition and the authorities cited therein and respectfully invites the court's re-examination of the petition. The writer, however, feels compelled in fulfilling his responsibility to the court and to his client to respond to the government's assertions.

2. The Government Concedes There Are Violations of the Antitrust Laws

Instead of arguing that copyright holders are not violating the antitrust laws, the government concedes the violations, but asserts that there are reasons for excusing them. These reasons are: (1) Combining copyrights and collective licensing are the only practical ways to market copyrights. (2) The petitioner has the burden of proving better alternatives and the petitioner has failed to do so. (3) Business difficulties justify collective activity. (4) Copyrights are different from other intangibles and require special protections. (5) Clearance at the source will not work in the broadcasting industry.

In conceding violations and then excusing them, the

government fails to answer the questions raised in the petition or to challenge the reasons why the court should hear this case. Summarizing, the government left unanswered these questions: (1) Should prices be fixed in the courts instead of in the free market? (2) Is illegal block booking purged by offering impractical methods of individual licensing? (3) Can a consent decree immunize against violations of the antitrust laws? (4) Does the *per se* rule apply to copyrights? (5) Should copyright owners be permitted to extend their individual copyright monopolies into larger monopolies? (6) Should the conflicting opinions in the lower courts be resolved?

3. Petitioner's Response to the Government's Assertions

Assertion No. 1. Combining copyrights and collective licensing are the only practical ways to market music.

This assertion means that the government places a higher value on the rights of copyright holders than it places on the rights of broadcasters and the public. The government's position is that music users must give ground to the marketing demands of copyright owners. Consequently, the music-using public must shoulder the burden of establishing feasible alternatives to marketing music (Govt. Mem. 13). Until then, music combinations and illegal bulk licensing arrangements must be condoned and sanctioned. Most astounding, the government postulates that free competition must retreat from the demands of business convenience and expedience (Govt. Mem. 8, 9, 13).

To vindicate these conclusions, the government makes

some startling statements. Statements which find no legal substantiation. Strong statements which are subjective and cannot be supported by case or statutory authority: "There is simply no escaping, as a practical matter, the licensing of the works in bulk." (Govt. Mem. 11). Again, "It would appear, therefore, that there must be some form of centralized licensing system . . ." (Govt. Mem. 9-10). "However, whatever the legality of a combination of copyright holders to pool and jointly sell these incidents of their copyrights, performing rights for recorded music are, for obvious practical reasons, subject to somewhat different considerations" (U.S. Mem. 8-9). Clearly the government has determined that the rights of the music-using public are inferior to the rights of copyright owners and therefore less worthy of protection.

Assertion No. 2. The petitioner has the burden of proving alternatives and the petitioner has failed to do so.

To compound the difficulty, the government requires the petitioner to first demonstrate and prove to the government's satisfaction that combined pricing and bulk licensing are inferior to alternatives found in the free market. This is unheard of in antitrust law and equity. In other words, the wrongdoer has a favoring presumption that his combined method of operation is legal so long as he establishes some practical excuse for his conduct. That excuse may be as meager as encountering business difficulties in operating in a free market. The burden then, shifts upon the public, in this case the broadcasters, to furnish a "substantial basis for concluding that practical alternatives exist . . ." (Govt. Mem. 13). The music user must then come forward with evidence demonstrating a

reasonable possibility that alternative methods are feasible" (U.S. Mem. 13). This hypothesis of relative burdens of proof and priority of evidence is unheard of in antitrust law procedure and manifestly unfair and inequitable to those who seek the protection of the Sherman Act.

After ostensibly asking for alternatives to bulk licensing and price fixing, the government subjectively and arbitrarily stamped those shown by the petitioner in the record and suggested in conferences as impractical.[1] (Govt. Mem. 9). The enormity of the burden to be overcome by any would-be private litigant in this field is unwarranted and almost unsurmountable.

Let us compare the alternatives the government offers broadcasters. Is it practical for a small radio station operator located three thousand miles distant to petition a federal court in New York city for redress? The "right" to petition for reasonable rates (if a percentage of gross income can ever be reasonable) is worthless to the vast majority of broadcaters and other small music users such as restaurants and skating rinks. The government is out of touch with reality. In truth and in fact the consent decree is impractical to use. It perpetuates monopoly and economic imbalance to the detriment of those it is purportedly designed to protect. The right to petition looks

1. During the trial several broadcasters testified that a master list of all copyrighted music offered by ASCAP or copyright holders could be made available with a price on each. Then broadcasters could easily select those priced according to value and worth to the user. Another alternative suggested by uncontroverted testimony was that clearance at the source on records would be feasible. (See testimony reprinted from the Transcript in Appellant's Brief, R. 36, App. Br., Appdx. 35-45, testimony of Rogan Jones, KGMI; Lincoln v. Miller, KIRO-TV; James W. Wallace, KPQ; Lee Facto, KGMI.)

good on paper, but in actuality it is an empty gesture and so impractical it is no right at all.

Speaking of practical alternatives and realities, these are incontrovertible realities, but the government has ignored or lost sight of them. ASCAP controls a vast pool of over one million copyrights—the bulk of all the copyrighted music in the world. Each single piece of music is arbitrarily assigned one price and one price only. Even the courts recognize this (See Pet. 14-15). All one million pieces of music are arbitrarily priced the same whether the music is a valuable favorite like "White Christmas" or a worthless has-been like "Three Little Fishes." Since 1913 this combination has controlled the marketing of music. In the past half century new industries have arisen—radio, television, motion pictures, tapes, commercial movies, community antenna television, background music, FM radio, stereo broadcasting, etc. Yet each of these music-using industries has been forced to obtain its music from ASCAP's pool and never has there been an opportunity to develop new and different methods of marketing music to fit changing needs. There never will be so long as ASCAP remains in control of the market. How can alternatives develop or be conceived when there never has been a free market in which to test them?

The thrust of the matter is for fifty years the government has turned its back on conceded antitrust violations and the needs of the public.

Assertion No. 3. Business difficulties justify collective activities.

To this assertion the petitioner needs only to cite the authorities. "The law does not allow an enterprise that

maintains control of a market through practices not economically inevitable, to justify that control because of its supposed social advantage. It is for Congress, not for private interests, to determine whether a monopoly, not compelled by circumstances, is advantageous." *United States v. United Shoe Mach. Corp.*, 110 F.Supp. 295, 345 (D. Mass. 1953). Aff'd, 347 U.S. 521 (1954).

"If good business reasons and expressions of good intent would serve as a defense for restraining trade, the Sherman Act would be rendered impotent." . . . *Hazeltine Research Inc. v. Zenith Radio Corp.*, 239 F.Supp. 51, 78 (N.D. Ill., 1965). The government cannot justify combining the individual monopolies of copyrights by arguing the necessities and convenience of such a policy. The Supreme Court has never permitted making the difference between legal and illegal conduct hinges upon an "elaborate inquiry as to the precise harm they have caused or the business excuse." . . . *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

Business excuse is a problem for copyright holders to overcome and not a problem for music users or the petitioner to overcome. Congress wrote no exemption in the Sherman Act for copyright holders and "it is for Congress to decide on what conditions, and subject to what regulations, such a monopoly shall conduct its business." *United States v. United Shoe Mach. Corp.* 110 F.Supp. at 345. For additional argument on citation of additional authorities see App. Br. 62-64.

Assertion No. 4. Copyrights are different from other intangibles and require special protection.

The government attempts to justify its conclusion that copyright owners deserve "tolerance" because music rec-

ords are not wholly comparable to other manufactured products and performance rights are different from other incorporeal rights such as patents (Govt. Mem. 8-10). This contention is indeed strained. It is strained more by the assertion that copyrights are in a "unique market" (Govt. Mem. 10).

One of the easiest ways out of a difficult problem is to argue the problem is different. The courts have never recognized differences between copyrights and patents within the context of the antitrust laws. *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Morton Salt v. Suppiger*, 314 U.S. 488 (1942); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F.Supp. 51 (1965); *Alden-Rochelle v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948). There is no difference between the market to perform music on records and the market to perform music on films (Govt. Mem. 9). Both films and records contain sounds recorded on mechanical devices. Much music is recorded on tapes rather than discs. A picture film is a tape with the added photographic image. Considering marketing problems, there are more theaters than radio stations in this nation. Thus, there are no more effective means to account for performance of music on films than on records.[2] Just as with records, the copyright act provides that once a holder has agreed to a recording of his work, it may be re-

2. Petitioner does not object to copyright holders combining in order to more economically and effectively police for infringements, but it does object to combining for illegal purposes such as bulk licensing and fixing prices.

corded on film by any company upon giving of appropriate notice subject to payment of two cents royalty. 17 U.S.C. 101. The similarities between patent rights and copyrights and performance rights on films and recorded tapes or discs far surpass the differences. Whether one is considering mechanics or markets, the government's contention that performance rights are "different" is strained to say the least.

Assertion No. 6. Clearance at the source will not work in the broadcasting industry.

In 1950 the government amended the ASCAP consent decree to require ASCAP to issue motion picture producers a single license covering copyrighted music on films without requiring further licenses by theaters showing the films (D. Ex. A-2, §V(c), See Govt. Mem. 12 footnote 9). Yet the government neglected to give this protection to television stations which show the very same films. ASCAP is prohibited by the decree from licensing or suing theater exhibitors for infringement of performance rights (D. Ex. A-2, §IV (E) (F)). This protection is not afforded television or radio stations. The government must be criticized for protecting the interests of the motion picture industry by prohibiting combination, rate fixing or block booking, and neglecting the broadcasting industry which uses the very same products in the same market. Certainly radio and television stations compete with theatres for the attention of the public, yet broadcasters pay fees to ASCAP, are sued and have no clearance at the source. Furthermore, broadcasters are required under the decree to accept industry-wide licenses and negotiate on an industry-wide basis. For the picture

industry the decree, however, requires licensing on a "per film" basis and not on an industry-wide basis (Def. Ex. A-2, §V (B) (2) (3)).

As can be seen the decree actually takes ASCAP out of the motion picture industry and prohibits copyright holders from combining to license this industry collectively. This same method of licensing at the source would work in the broadcasting industry (see petitioner's explanation of how it would work, Pet. 20-21).

The government, however, contends that recording companies have no economic incentive to seek performance rights while motion picture producers do (Govt. Mem. 12). Until the decree was amended in 1950 requiring licenses to be issued to producers, no producers asked for licenses. But when the courts forced the government to amend the decree, then and only then did licensing at the source have a chance to work. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F.Supp. 843 (D. Minn. 1948).

So long as ASCAP controls the market for performance rights, it can continue to force broadcasters and other music users to purchase the rights. Recording companies have no incentive to offer broadcasters performance rights as an inducement to purchase and play their records. Before the *Alden-Rochelle* and *Witmark* cases picture producers, like recording companies, had no economic incentive to seek performance rights. Once ASCAP lost its control over the market and could no longer force exhibitors to take performance licenses, the producers of pictures in order to induce exhibitors to show their films

had to acquire the performance rights and in turn offer them to the exhibitors. As stated in the petition, the same result would follow in the recording industry if this court would require ASCAP to treat the broadcasting industry as it treats the motion picture industry (Pet. 20-21). The record shows if broadcasters have a choice between purchasing and playing records which are cleared and those which are not, they would obviously only play cleared records (see testimony reproduced in App. Br. p. 36, Appx. 35-45). The rights of the public and copyright owners could easily be protected by simply printing on the tape or record label a statement that the performance rights are cleared for commercial use or not cleared. This suggestion was made to the government, but the government's staff brushed it aside with the cavalier remark that it would not work, notwithstanding that it is presently being done in Europe today.[3]

CONCLUSION

The petitioner regrets to say that it questions the value of the government's views. Howard E. Shapiro and Daniel Friedman, attorneys in the Department of Justice, told the petitioner's counsel, Ronald A. Murphy, that the antitrust division had no choice but to support its own decree. Furthermore, the Solicitor General was very inclined to follow the recommendation of the antitrust division in presenting its views to the court. The petitioner wonders how under these inexorable circumstances the government could reach any different conclusion than to urge the court to deny the writ.

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3. Schemel and Krasilovsky, *The Business of Music*, First Ed. p. 22 (1964).

The government's views are based upon excuses. The government did not answer the questions raised in the petition. Instead, the government avoided them by urging that central licensing is the only practical way music can be marketed. Why? Because this is the thrust of the consent decree which has been fostered by the government for over twenty-seven years. The government is loath to admit that its decree has not been effective to protect the public and that the public has suffered unnecessarily for so many years. Most hopefully this court will see fit to make the government change a decree that is not working for the benefit of the public, but is instead protecting wrongdoers under the guise of necessity.

Respectfully submitted,

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